



U.S. Department of Justice

Immigration and Naturalization Service

N

OFFICE OF ADMINISTRATIVE APPEALS

425 Eye Street N.W.

ULLB, 3rd Floor

Washington, D.C. 20536

[REDACTED]

FILE: [REDACTED] Office: California Service Center

Date:

IN RE: Applicant:

[REDACTED]

APR 19 2000

APPLICATION:

Application for Permission to Reapply for Admission into the United States after Deportation or Removal under § 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT:

[REDACTED]

Public Copy

entering and leaving the country prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was present in the United States without a lawful admission or parole on December 18, 1987. An Order to Show Cause was issued in her behalf on January 23, 1992. The applicant was ordered deported *in absentia* on March 31, 1992. Therefore, she is inadmissible under § 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(9)(A)(ii). The applicant became the beneficiary of an approved employment-based preference visa petition on January 17, 1992 with a priority date of April 28, 1989. The applicant married [REDACTED] in Los Angeles on December 31, 1992.

The applicant applied for a stay of deportation. In deportation proceedings held on May 28, 1996, the immigration judge denied the application after holding that the applicant attempted to avoid the court and a deportation hearing by leaving the United States upon notice of a deportation hearing. The judge indicated that the applicant reentered the United States subsequently, but cannot avoid the court's order simply by reentering the United States again illegally. The applicant was removed to Mexico on May 30, 1996. The record reflects that the applicant was present in the United States again without a lawful admission or parole following her removal and without permission to reapply for admission in violation of § 276 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1326 (a felony). The applicant seeks permission to reapply for admission into the United States under § 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii).

The director requested additional documentation. After failing to receive such documentation, the director determined, based on the record as constituted, that the unfavorable factors outweighed the favorable ones and denied the application accordingly.

On appeal, counsel states that the director failed to consider the merits of the application. Counsel states that the applicant has never been arrested by the police or convicted of a crime, she has a U.S. citizen child born in 1993 and the employer, Goodnight Inn, continues to need her services.

Section 212(a)(9). ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(ii) OTHER ALIENS.-Any alien not described in clause (i) who-

(I) has been ordered removed under § 240 of the Act or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or

within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) EXCEPTION.-Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as § 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, Interim Decision 3289 (BIA, A.G. 1996), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

Prior to 1981, an alien who was arrested and deported from the United States was perpetually barred. In 1981 Congress amended former § 212(a)(17) of the Act, 8 U.S.C. 1182(a)(17), eliminated the perpetual debarment and substituted a waiting period. The Service argued that most precedent case law relating to permission to reapply for admission was effectively negated by the new statute in 1981, and as a consequence, granting of these applications required an applicant to meet a higher standard of eligibility since the bar was no longer insurmountable.

A review of the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of

stay and/or from being present in the United States without a lawful admission or parole.

Section 241.(a) DETENTION, RELEASE, AND REMOVAL OF ALIENS ORDERED REMOVED.-

(5) REINSTATEMENT OF REMOVAL ORDERS AGAINST ALIENS ILLEGALLY REENTERING.-If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act [chapter], and the alien shall be removed under the prior order at any time after reentry.

The applicant was removed from the United States on May 30, 1996. She has never been granted permission to reapply for admission. The record reflects that she is now unlawfully present in the United States because she obtained a set of her fingerprints from the California Department of Justice in 1998, made in-person requests from police departments at that time and listed her present address as [REDACTED] on her 1997 application. There is no evidence in the record to support a claim that she is residing outside the United States and has resided outside the United States continuously since May 30, 1996. Since the applicant appears to be subject to the provisions of § 241(a)(5) of the Act, she is not eligible for any relief under this Act and the appeal will be dismissed.

ORDER: The appeal is dismissed.